



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 749 OF 2017

(Formerly Nairobi ELC Case No. 1594 of 2014)

REUBEN SIAMETO KAMUKURU.....PLAINTIFF

VERSUS

MELTON TONI KISOSO.....1ST DEFENDANT

LIPA EASY LIMITED.....2ND DEFENDANT

JUDGEMENT

By a Plaint dated the 23rd December, 2014 the Plaintiff prays for judgement to be entered against the Defendants jointly and severally for:

- i. A perpetual injunction to restrain the Defendants from constructing, developing or in any other way interfering with the Plaintiff's quiet and peaceful occupation of Plot No. NGONG/ NGONG/ 4480/160;
- ii. The Defendants be and are hereby directed to reconstruct the Plaintiff's damaged structures forthwith;
- iii. Mesne profits;
- iv. General damages;
- v. Costs of the suit;
- vi. Interest on (iii) and (iv)

The Defendants filed a Defence dated the 26th February, 2015 where they admitted the descriptive and the jurisdiction of the Court. They admitted that the Plaintiff was owner of Plot No. NGONG/ NGONG/ 4480/160 hereinafter referred to as the 'the suit land', but denied that the same is developed with the stated structures. They insisted the alleged structures are semi detachable and semi-permanent. They further admitted that there were works being undertaken on the 1st Defendant's land but deny that the same was done without proper identification of the beacons. They contended that the Plaintiff's property had been condemned by the Ministry of Health and at the point of contracting the Defendants, the same was to assist the Plaintiff in terms of rent and furtherance of good neighbourliness. They admitted entering into an agreement with the Plaintiff which was premised on the fact that the Plaintiff's structures being semi – permanent had not been built on any foundation as provided for under building including planning laws and an end result being that the same was susceptible to collapse. The Defendants averred that at the time of the agreement and during the entire period of excavation, the suit premises was on 20% occupancy, a fact that still remains and exists to date. They reiterated that the Plaintiff was not entitled to the reliefs sought.

The matter proceeded for hearing where the Plaintiff called one witness while the Defendant also had one witness.

Evidence of the Plaintiff

PW1 testified that he is the registered proprietor of the suit land wherein he had constructed rental premises which included four shops at the front and thirteen residential rooms at the back. Further, that the said structures were semi-permanent. PW1 claimed in October, 2014, the 2nd Defendant who was an agent of the 1st Defendant while excavating the 1st Defendant's property which is adjacent to the suit land, encroached on it culminating in its destruction. Further, that the latrines thereon were also destroyed. He explained that before the destruction he had been receiving rental proceeds of Kshs. 112,000 per month. It was his testimony that on the 15th October, 2014, the Public Health offices issued a notice and closed his plot. Further, that on 18th October, 2014, they entered into an agreement with the Defendants

which had been prepared by the 2nd Defendant's lawyers. In the said agreement, the 2nd Defendant agreed to restore the suit land to its former condition. He claimed to have only been paid Kshs. 51,000/= as compensation, although they were meant to pay him Kshs. 112,000/=. Further, the suit land has never been restored. He testified that he used Kshs. 900,000/= to pay for development within the suit land.

In cross examination, he confirmed the total of Kshs. 112,000/= being rental income is not indicated in the agreement. He could not explain who made the writing by hand within the said Agreement. He was categorical that each shop costed Kshs. 15,000/= in rent but he did not indicate the same in his witness statement.

In re-examination he reiterated his claim above and confirmed having been given a cheque of Kshs. 51,000/= on 20th December, 2014 and after that he has never been paid a single cent. The Plaintiff produced the Agreement dated 18th October, 2014; Closure Notice dated 15th October, 2014; Cost of Building; Copy of Cheque dated 20th December, 2014; Copy of Certificate of Title IRN. 3461 and Order dated 15th January, 2015 as his exhibits.

Evidence of the Defendants

DW1 Anthony Migwi who is a director to the 2nd Defendant confirmed that it entered into an agreement dated the 18th October, 2014 with the Plaintiff since it was constructing on a plot adjacent to the suit land. Further, that they signed the said agreement but the Plaintiff never did so and neither was the signed one returned to them. He disputed the contents of the handwritten portions as the same was not done by their lawyer. He explained that at the time of excavation, they found that the Plaintiff's land was compromised due to the integrity of the semi – permanent structures on the said land. Further, the said structures were only 20% occupied as the sanitation was poor and the County Government had condemned it as they were poorly done. He insisted their Agreement was executed after the premises within the suit land had been shut down. He stated that they paid the Plaintiff Kshs. 135,000/=. He confirmed that upon excavation, the Plaintiff's land began to cave in on one side and for safety, they discussed and agreed to have the same demolished and gave the Plaintiff some consideration over and above the payment to restore the property to the condition they had found it. He further confirmed that they were yet to restore the suit land as the Plaintiff declined since matter was in court. He reiterated that there was no Agreement between Plaintiff and 1st Defendant.

In cross examination, he confirmed they commenced excavation works on the 1st Defendant's property which was adjacent to the suit land in August, 2014 through to October, 2014. Further, that the said excavation loosened the soil on the suit land. He did not know the expenses the Plaintiff utilized to develop the suit land. He insisted there were two tenants on the far side of the Plaintiff's property. He admitted that as a result of the excavation, the Plaintiff's structures were not tenable. He explained that as per negotiations, they had agreed to pay 50 % of the Plaintiff's rental income for October, 2014 as it was mid-month, which was effected vide a cheque dated 20th December, 2014 for Kshs. 51,000/=. He further confirmed that the premises demolished included four shops and thirteen rental rooms but disputed the rent of Kshs. 15,000 per month for the shops and admitted that the rents for the rooms costed Kshs. 4,000/= per month. Further, that for the entire five years the Plaintiff had not earned any income of rent from the backside but the front shops were not affected. He further admitted that they rented the Plaintiff's shops for two months and the Kshs. 51,000/= was paid as part of the rent.

In re examination he contended that by the time of entering into the agreement, the premises were condemned. Further, he had not seen a notice from the Public Health Office lifting their order. He reiterated that they had paid the Plaintiff Kshs. 135, 000/=.

The Plaintiff and the Defendants filed their respective submissions which I have considered.

Analysis and Determination

Upon consideration of the Plaintiff, Joint Defence, Witness Testimonies, exhibits and submissions, the following are the issues for determination:

- Whether the Defendants should be directed to reconstruct the Plaintiff's damaged structures forthwith.
- Whether the Plaintiff should be compensated for loss of income from the demolished structures.
- Who should bear the costs of the suit.

As to whether the Defendants should be directed to reconstruct the Plaintiff's damaged structures forthwith. The Plaintiff in his submissions reiterated his claim and stated that the excavation by the 2nd Defendant on the adjacent parcel of land which belonged to the 1st Defendant weakened his structures and as a result the toilets were destroyed. He contended that they entered into an agreement dated the 18th October, 2014 wherein the 2nd Defendant had accepted to demolish his property, reconstruct it as well as compensate him for loss of income from the demolished structures. The 2nd Defendant on the other hand claims the Plaintiff failed to disclose that the said structures had been condemned by the Public Health Officials prior to their signing of the Agreement on 18th October, 2014. The Defendants in their submissions insist that the 2nd Defendant cannot effect their obligation to an agreement where the other party has denied them access. In support of this averment, they relied on the case of **Samuel Kamau Macharia Vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company (2003) eKLR**.

DW1 admitted during cross examination that the excavation on the 1st Defendant's property had commenced in August through to October, 2014. DW1 further admitted that upon excavation, the Plaintiff's land began to cave in on one side and for safety, they agreed to have the same demolished and later restore the suit land. He claimed it is the Plaintiff who declined to allow them to do so. He failed to furnish court with any form of communication they had directed to the Plaintiff seeking to reconstruct his premises. He further admitted that the said project had stalled. On being questioned on the contents of the Agreement, he confirmed that the 2nd Defendant's lawyer had indeed prepared

the Agreement and the Plaintiff sought to consult his lawyer on the same but disputed the handwritten section. He reiterated that there was no Agreement between the Plaintiff and 1st Defendant. To my mind I have no reason to doubt the evidence of the Plaintiff that the premises on the suit land got destroyed in October 2014 as a result of the 2nd Defendant's excavation. Further, that the Defendants have declined to reconstruct the same despite the Agreement. Insofar as the Defendants claim the Plaintiff wants to take a position of advantage over them, I opine that it is actually the Defendants who seem to be doing so. Based on the evidence before me, I find that the Defendants should indeed be compelled to reconstruct the Plaintiff's damaged structures on the suit land as had agreed upon.

As to whether the Plaintiff should be compensated for loss of income from the demolished structures.

In his submissions, the Plaintiff contended that the 2nd Defendant had breached the Agreement they had entered into by failing to pay Kshs. 112, 000/= per month until the premises were reconstructed. He insisted that he is entitled to payment and compensation of the demolished structures. He reiterated that the 2nd Defendant should pay him for lost rent of 4 shops and 13 rooms which used to attract rental income of Kshs. 4,000 for each room and Kshs. 15, 000/= for each shop per month, totalling Kshs. 112,000 monthly. Further, the 2nd Defendant only paid him Kshs. 51,000/= being 50% of the October 2014 rent after which he has never paid a single cent. In his submissions, the 2nd Defendant insisted the Plaintiff had already been paid Kshs. 135,000/= for the damage but provided no proof of the same. They insist the Plaintiff wants to unjustly enrich himself by seeking Kshs. 1,895,000/= as at 14th April, 2016. He disputed the building contract but DW1 in cross examination confirmed he did not know the cost the Plaintiff used in constructing the structures on his land.

PW1 in his testimony explained that prior to the destruction of premises, he had been receiving rental proceeds of Kshs. 112,000 per month. It was his testimony that on the 15th October, 2014, the Public Health offices issued a notice and closed the premises on the suit land. Further, that on 18th October, 2014, they entered into an agreement with the Defendants which had been prepared by the 2nd Defendant's lawyers. In the said agreement, the 2nd Defendant agreed to restore the suit land to its former condition. He claimed to have only been paid Kshs. 51,000/= as compensation, although they were meant to pay him Kshs. 112,000/= per month until the reconstruction was complete. Further, the suit land had never been restored. PW1 however was unable to explain the person who made hand written changes in the aforementioned Agreement and why he failed to indicate the rental income of Kshs. 112,000 per month which he had been receiving. PW1 further confirmed that apart from receiving the Cheque of Kshs. 51,000/= on 20th December, 2014, the 2nd Defendant had never paid him a single cent.

DW1 insisted that at the time of demolition there were only two tenants on the far side of the Plaintiff's property. He explained that as per negotiations, they had agreed to pay 50 % of the Plaintiff's rental income for October, 2014 as it was mid month. Further, part of the 50% was paid by cheque dated 20th December, 2014 for Kshs. 51,000/= . He did not have any records to confirm how much they had paid to the Plaintiff except for the Kshs. 51, 000/=. He had no evidence in court to show how much money they offered to the Plaintiff. He admitted that they were yet to restore structures on the suit land. He disputed the rent of Kshs. 15,000 per month for the shops but admitted that the rents for the rooms was costing Kshs. 4,000/= each per month. Further, that for the entire five years the Plaintiff had not earned any rent from the backside as the front shops were not affected. He further admitted that they rented the Plaintiff's shops for two months and the Kshs. 51,000/= was paid as part of the rent.

From this evidence before me, I find that the Plaintiff is indeed entitled to rental proceeds amounting to Kshs. 4000 per month for each of the thirteen rooms from November, 2014 until the reconstruction of the structures on the suit land. However, as for the rent for the shops, I note the Plaintiff did not furnish court with the any proof of the same and since DW1 disputed it, it is incumbent upon the Court to proceed to assess it. If we are to consider the Kshs. 51,000 rental income for October 2014, which was paid to the Plaintiff, which fact DW1 admitted while taking into account that 50% of the said amount was for the thirteen rooms which is Kshs. 26, 000, with the remaining Kshs. 25,000/= being for the four shops; it emerges that each of the shop's rent for half of October, 2014 was Kshs. 6, 250/= which was the amount for half month. With this in mind, I will hence to proceed to award the Plaintiff Kshs. 12, 500 per month for each of the shops.

As to who should bear the costs of the suit.

Since the Plaintiff is the inconvenienced party herein, I will award him costs and direct that the Defendants bear the same.

It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to enter judgment for him as against the Defendants in the following terms:

- i) The Defendants be and are hereby directed to reconstruct the Plaintiff's damaged structures on LR. NO. No. NGONG/ NGONG/ 4480/160; within 90 days from the date hereof.
- ii) The 2nd Defendant be and is hereby directed to compensate the Plaintiff for the loss of rent for the four shops and thirteen rooms on LR. No. NGONG/ NGONG/ 4480/160; from November, 2014 until the reconstruction of the Plaintiff's structures as follows: Kshs. 4,000 for each room per month and Kshs. 12, 500 for each shop per month.
- iii) The costs of the suit is awarded to the Plaintiff.
- iv) Interest on (ii) and (iii) above from the date of judgment until payment in full.

Dated signed and delivered at Kajiado this 1st Day of October, 2020

CHRISTINE OCHIENG

JUDGE